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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GABRIEL GOMEZ, JR., Defendant and Appellant.	E062867 (Super.Ct.No. FSB1402290) OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Sheila Quinlan for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Arlene A. Sevidal and Christen Somerville, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Gabriel Gomez, Jr., pleaded guilty to unlawfully driving or taking a vehicle in violation of Vehicle Code section 10851, subdivision (a). Thereafter, Proposition 47 went into effect. Proposition 47 allows a defendant convicted of one of several theft-related felonies to petition to have that conviction treated as a misdemeanor, provided the value of the property involved did not exceed $950. Defendant filed a petition pursuant to Proposition 47, but the trial court denied it on the ground that Proposition 47 does not apply to a conviction for unlawfully driving or taking a vehicle.

Defendant appeals, arguing that Proposition 47 does apply to a conviction for unlawfully driving or taking a vehicle, or, alternatively, it must be deemed to apply as a matter of equal protection. We do not reach these arguments, however, as we conclude that the trial court was required to deny the petition in any event because defendant did not show that the value of the property involved was $950 or less. Hence, we will affirm.

I

PROCEDURAL BACKGROUND

On July 9, 2014, defendant pleaded guilty to unlawful driving or taking of a motor vehicle. (Veh. Code, § 10851, subd. (a).) According to the complaint, the subject vehicle was a 2002 Chevrolet Suburban that belonged to Rotolo Chevrolet. Pursuant to the plea bargain, defendant was sentenced to two years in prison.

On November 5, 2014, Proposition 47 went into effect. (See *People v. Esparza* (2015) 242 Cal.App.4th 726, 735.)

On November 14, 2014, defendant, in propria persona, filed a petition to have the conviction redesignated as a misdemeanor pursuant to Penal Code section 1170.18 (which had been enacted by Proposition 47). At a hearing on the petition, at which defendant was represented by appointed counsel, the trial court denied the petition. It ruled that "defendant's convicted charge does not qualify for relief under Prop. 47 or Penal Code section 1170.18 . . . ."

II

THE TRIAL COURT HAD TO DENY THE PETITION

BECAUSE DEFENDANT DID NOT SHOW THE VALUE OF THE PROPERTY

Defendant contends that the trial court erred by ruling that Penal Code section 1170.18 does not apply to a conviction under Vehicle Code section 10851, subdivision (a). Alternatively, he also contends that Penal Code section 1170.18 must be deemed to apply to a conviction under Vehicle Code section 10851, subdivision (a) as a matter of equal protection.

In response, the People contend (among other things) that, even assuming Penal Code section 1170.18 does apply to a conviction under Vehicle Code section 10851, subdivision (a), defendant did not show that the value of the vehicle was $950 or less so as to make him eligible for resentencing. We begin with this contention, because we find it dispositive.

In general, Proposition 47 reduced certain theft-related offenses — provided they involve property worth $950 or less — as well as certain possessory drug offenses from

felonies (or wobblers) to misdemeanors, unless the defendant has a disqualifying prior conviction. (Couzens & Bigelow, Proposition 47: "The Safe Neighborhoods and Schools Act" (Feb. 2016 rev. ed.) pp. 24-28 (Couzens & Bigelow), available at <http://www.courts.ca.gov/documents/Prop-47-Information.pdf>, as of Mar. 14, 2016.)

Proposition 47 also allowed persons previously convicted of one of the specified offenses as a felony to petition to reduce the conviction to a misdemeanor. Specifically, it enacted Penal Code section 1170.18, which, as relevant here, provides:

"(a) A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act.

"(b) Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a). If the petitioner satisfies the criteria in subdivision (a), the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor pursuant to Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, those sections have been amended or added by this act, unless the court, in its

discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety."

"The statute itself is silent as to who has the burden of establishing whether a petitioner is eligible for resentencing. However, Evidence Code section 500 provides, '[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.' Because defendant is the petitioner seeking relief, and because Proposition 47 does not provide otherwise, 'a petitioner for resentencing under Proposition 47 must establish his or her eligibility for such resentencing.' [Citations.] In a successful petition, the offender must set out a case for eligibility, stating and in some cases showing the offense of conviction has been reclassified as a misdemeanor and, where the offense of conviction is a theft crime reclassified based on the value of stolen property, showing the value of the property did not exceed $950. [Citations.] The defendant must attach information or evidence necessary to enable the court to determine eligibility. [Citation.]" (*People v. Perkins* (2016) 244 Cal.App.4th 129, 136-137.)

Defendant did not meet his burden in this case. He did allege in his petition that he "was charged with theft of property under $950." However, he did not allege that the property was *actually* worth $950 or less, nor did he allege any facts that would support such a claim.[1] The petition provided no information whatsoever about the nature and

[1] Defendant contends that the relevant value should be based on the compensation necessary to make the victim whole, rather than on market value. Inasmuch as he did not allege either amount, we need not address this contention.

value of the stolen property to aid the superior court in determining whether defendant is eligible for resentencing. As a result, defendant did not provide the superior court with information that would allow it to "determine whether the petitioner satisfies the criteria in subdivision (a)." (Pen. Code, § 1170.18, subd. (b).) We conclude that defendant did not meet his burden of alleging a prima facie case of eligibility for resentencing.

"Our conclusion that defendant must provide some evidence of eligibility when he files the petition is supported by the language and structure of the statute. Section 1170.18, subdivision (a) permits offenders currently serving sentences for reclassified offenses to 'petition for a recall of sentence' and 'request resentencing.' 'The statute does not expressly require the trial court to hold a hearing before considering the eligibility criteria, nor is there a reference to the taking of "evidence" or other proceeding that would compel involvement by the parties. The statute simply states: "Upon receiving a petition for recall of sentence under this section, the court shall determine whether the petitioner satisfies the [eligibility] criteria." [Citation.]' [Citation.] Thus, the statute appears to assume most petitions can be resolved based on the filings. We read the statute to fairly imply that in the normal case the superior court will rule on the basis of the petition and any supporting documentation." (*People v. Perkins*, *supra*, 244 Cal.App.4th at p. 137.)

Thus, "[t]he superior court 'will be able to summarily deny relief based on any petition that is facially deficient. Resentencing may be denied based solely on the fact of a prior conviction of a designated "super strike" or any offense requiring registration as a

sex offender under section 290(c).' [Citation.] In many cases, a petition will be deficient because the offender seeks resentencing for a crime that has not been reclassified as a misdemeanor. [Citation.] In other cases, the superior court may be able to determine whether a petitioner is eligible for resentencing simply by consulting the record of conviction or evidence submitted by the parties." (*People v. Perkins*, *supra*, 244 Cal.App.4th at p. 138.)

We recognize that the trial court denied the petition, not because the petition failed to establish the value of the property, but because the court deemed Proposition 47 inapplicable to a conviction under Vehicle Code section 10851, subdivision (a). Nevertheless, we may affirm its ruling on the former ground. "[T]he task of an appellate court is to 'review the correctness of the challenged ruling, not of the analysis used to reach it.' [Citation.] '"'If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citation.]"' [Citation.]" (*People v. Hughes* (2012) 202 Cal.App.4th 1473, 1481.)

Defendant has not asked us to decide whether he could file a second (or an amended) petition. Even had he done so, we would exercise our discretion to decline the request as premature. (See *People v. Swain* (1996) 12 Cal.4th 593, 610 ["the question of former jeopardy, or any other question regarding further proceedings, is premature unless and until the People . . . seek to retry defendants . . . ."].)

III

DISPOSITION

The order appealed from is affirmed.

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RAMIREZ
P. J.

I concur:

CODRINGTON
J.

MILLER, J., Concurring.

I concur in the result. However, unlike the majority, I believe that this court should address whether Vehicle Code section 10851 could qualify as a misdemeanor under Proposition 47. (Maj. Opn., *ante*, at 2, 6-8.) I conclude that under a properly plead petition, a felony conviction of Vehicle Code section 10851 could qualify for resentencing as a misdemeanor under Proposition 47.

Proposition 47 added Penal Code section 1170.18. Subdivision (a) of Penal Code section 1170.18, provides in pertinent part, "A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act." Under Penal Code section 1170.18, subdivision (b), the trial court first determines whether the petition has presented a prima facie case for relief under Penal Code section 1170.18, subdivision (a). If the petitioner satisfies the criteria in subdivision (a), then he will be resentenced to a misdemeanor, unless the court,

within its discretion, determines the petitioner would pose an unreasonable risk to public safety. (Pen. Code, § 1170.18, subd. (b).)

Vehicle Code section 10851 is not listed in Penal Code section 1170.18, and the issue of whether a defendant is eligible for resentencing for a violation of that section is currently under review in the California Supreme Court in *People v. Page* (2015) 241 Cal.App.4th 714, review granted January 27, 2016, S230793.

Section 490.2 was added to the Penal Code. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) Penal Code section 490.2 provides in pertinent part, "Notwithstanding [Penal Code s]ection 487 *or any other provision of law defining grand theft*, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . . ." (Italics added.)

Penal Code section 1170.18 clearly states that a defendant must show he was convicted of a felony but would have been convicted of a misdemeanor if Proposition 47 had been in effect at the time of the offense. For an offense under section 490.2, which was *added* to the Penal Code, defendant had to allege facts in the petition that he would have been guilty of a misdemeanor violation of Penal Code section 490.2 rather than the felony conviction. Vehicle Code section 10851 can be violated by the taking of a vehicle with the intent to permanently deprive the owner of the vehicle. As the California Supreme has held, "Vehicle Code

section 10851 . . . defines the crime of unlawful driving *or* taking of a vehicle. Unlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession is a form of theft, and the taking may be accomplished by driving the vehicle away. For this reason, a defendant convicted under [Vehicle Code] section 10851[, subdivision](a) of unlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession has suffered a theft conviction . . . ." (*People v. Garza* (2005) 35 Cal.4th 866, 871.)

This conclusion is also supported by the analysis of the Legislative Analyst for Proposition 47. The following analysis was made: "Under current law, theft of property worth $950 or less is often charged as petty theft, which is a misdemeanor or an infraction. However, such crimes can sometimes be charged as grand theft, which is generally a wobbler. For example, a wobbler charge can occur if the crime involves the theft of certain property (*such as cars*) or if the offender has previously committed certain theft-related crimes. This measure would limit when theft of property of $950 or less can be charged as grand theft. Specifically, such crimes would no longer be charged as grand theft solely because of the type of property involved or because the defendant had previously committed certain theft-related crimes." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), p. 35, italics added.)

Based on the foregoing, assuming that a defendant could establish in a Penal Code section 1170.18 petition that he took a vehicle valued under $950,

with the intent to permanently deprive the owner of possession, such violation could constitute a violation of Penal Code section 490.2. As such, the trial court erred by ruling that all violations of Vehicle Code section 10851 do not qualify under Proposition 47.

However, I agree with the majority; based on the petition filed in the trial court, defendant did not meet his burden of establishing that the vehicle he took was valued under $950 or that he committed the vehicle theft with the intent to permanently deprive the owner of the vehicle. As such, defendant failed to meet his burden of establishing that his conviction under Vehicle Code section 10851 should be reduced to a misdemeanor. Defendant's petition was properly denied.

MILLER

J.